

Nos. 08-3517, 08-3518, 08-3709, 08-3859

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

NEW PROCESS STEEL, L.P.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS
FOR ENFORCEMENT OF ORDERS OF
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

The jurisdictional statement of New Process Steel, L.P. (“the Company”) is correct, but incomplete. The Board had subject matter jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act” or “the NLRA”), which authorizes the Board to prevent unfair labor practices affecting commerce. This

Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred in Butler, Indiana. The Board's Orders are final orders and properly reviewable, as the Act imposes no time limit on filings of petitions for review and cross-applications for enforcement of final Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Chairman Schaumber and Member Liebman, sitting as a two-member quorum of a properly-established three-member group within the meaning of Section 3(b) of the Act, acted within the full powers of the Board in issuing the Board's Orders in this case.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by repudiating and refusing to adhere to the collective-bargaining agreement it reached with the Union.

3. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union.

STATEMENT OF THE CASE

These unfair labor practice proceedings came before the Board on two separate complaints issued by the Board's General Counsel, pursuant to charges

filed by District Lodge 34, International Association of Machinists and Aerospace Workers, AFL-CIO (“the Union”). (A. 31.)¹ The first complaint, which issued on December 28, 2007, alleged that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §§ 158(a)(5) and (1)) by refusing to adhere to and repudiating a collective-bargaining agreement it reached with the Union. After a hearing, an administrative law judge issued a decision finding that the Company had violated the Act as alleged. The Company filed exceptions, and the Board’s General Counsel filed an answering brief. (A. 32-38.) On September 25, 2008, the Board affirmed the judge’s rulings, findings, and conclusions and adopted his recommended order. (A. 5, 13-15.)

The second complaint, which issued on May 28, 2008, alleged that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §§ 158(a)(5) and (1)) by withdrawing recognition from the Union as the exclusive collective-bargaining representative of its employees during the term of a binding contract. (A. 16.) On September 30, 2008, after issuing the Order finding that the Company unlawfully repudiated the contract with the Union, the Board issued an Order granting the Board’s General Counsel’s motion for summary judgment and

¹ “A.” refers to the appendix filed by the Company with its opening brief. “B.A.” refers to the short supplemental appendix the Board is submitting simultaneously with its brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to the Company’s opening brief.

directing the Company to cease and desist from withdrawing recognition from the Union during the term of the collective-bargaining agreement, and to recognize and bargain with the Union. Thereafter, the Company initiated these proceedings with petitions to review the Board's Orders, and the Board filed cross-applications for enforcement of its Orders. (A. 16-19.) The Court then consolidated these cases for purposes of briefing and disposition.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACTS

A. Background; the Company and the Union Commence Negotiations for an Initial Collective-Bargaining Agreement; During Negotiations, the Parties Do Not Discuss Ratification or the Union's Ratification Procedure

The Company manufactures and sells pre-cut and formed steel at four facilities in the United States and one in Mexico. The events in this case arose at the Company's Butler, Indiana facility, where it employs about 32 maintenance and production employees, and where, on August 25, 2006,² the Board certified the Union as the exclusive collective-bargaining representative of those employees. (A. 6, 16; B.A. 1-13, 28-29, 38, 49.)

On September 6, the Company and the Union commenced negotiations for an initial collective-bargaining agreement. Attorney Mike Oesterle led the

² Dates are in 2006, unless otherwise indicated.

Company's bargaining team, which also included Plant Manager Steven Hartz. Although not involved in the negotiations from the beginning, Union Business Representative Joseph Chaszar led the Union's team during the time period relevant here.³ From the onset, the parties agreed that, as they bargained and reached agreement on specific contract provisions, they would sign or initial those provisions. (A. 6; B.A. 29-30, 35, 48-50.)

Over an 11-month period, the parties held approximately 25 bargaining sessions, during which the Company offered 46 written counterproposals. Three of those counterproposals contained references to "ratification." (A. 10, 13 n.11; B.A. 47.) Thus, in its opening counterproposal, offered on October 3, the Company suggested that:

As proposals are considered by the parties, agreements on Articles an[d]/or Sections of the proposed labor contract will probably occur on a clause-by-clause basis. It is the Company's position that these agreements will not become contractually effective until the day and date that a total agreement on all parts of the contract is reached, ratified, and signed by the parties.

(A. 6; B.A. 20.)

Another reference appeared in Company Negotiator Oesterle's July 31, 2007 letter to Union Negotiator Chaszar summarizing the status of the negotiations and the parties' positions. In discussing the Company's proposed "Parties and Terms"

³ Chaszar joined the Union's bargaining team and became its chief negotiator in April 2007, approximately 8 months after the September 6 commencement of negotiations. (A. 6.)

article, Oesterle wrote, “The Company proposes a one-year deal, effective the date that the contract is signed, executed, and ratified, whichever is later.” (A. 6; B.A. 21-23, 45-46.) The parties never verbally discussed either the October 3 or July 31 reference to ratification, and neither reference remained in the Company’s final proposal that the Union ultimately accepted. (A. 6, 9 n.11.)

The third ratification reference, and the only one in the Company’s final contract proposal submitted on August 9, 2007, appeared in the wage provision. That provision stated: “Beginning the effective date of this Agreement, or on the date the total Agreement is properly ratified, signed and executed, whichever is later, the Company agrees to pay not less than the following minimum wage rate[s].” (A. 6, 9 n.11; B.A. 18.)

B. The Union Accepts and Signs the Company’s Entire Final Contract Proposal; the Parties Agree to Submit the Contract For Ratification; the Unit Employees Accept the Contract Pursuant to the Union’s Procedures; the Union Notifies the Company of the Ratification; the Company Signs and Implements the Agreement

On Thursday, August 9, 2007, after 11 months of bargaining, the Union accepted the Company’s final contract proposal in its entirety. Chaszar signed the agreement and asked Oesterle to do the same. Oesterle demurred, declaring for the first time in negotiations that the Company would sign the agreement “only after ratification.” (A. 6, 9 n.11; B.A. 30.) As Oesterle later testified, he knew there was a lot of talk in the shop about decertifying the Union, and because “the

contract had a lot of take-aways [and] reduction in benefits [he] wanted to make sure [the employees] had an opportunity to [] voice their opinion, and vote for the contract and let their voice be heard.” (A.7; B.A. 39.) Chaszar agreed, but replied that the Union would like to “vote the contract today.” Oesterle rejected that suggestion, stating that the Company had production scheduled, and that the Union would have to conduct the ratification meeting and vote on its “own time.” Chaszar agreed to conduct the vote that weekend. (A. 6, 7; B.A. 37.)

On Sunday, August 12, 2007, Chaszar met with about 23 unit employees at a nearby hotel for a ratification election on the collective-bargaining agreement. First, Chaszar explained that the agenda for the day was to review the proposed contract, give everyone an opportunity to ask questions, and conduct a secret ballot ratification vote according to the Union’s established contract ratification procedure. (A. 7; B.A. 37.) He informed the employees that under that procedure, which is outlined in Union Circular No. 813, a simple majority of the votes cast is required for ratification. (A. 7; B.A. 25, 60-61.) Chaszar explained that, if that vote failed, there would be a second vote to determine whether to call a strike. He added that a two-thirds majority vote was required to call a strike and that, if fewer than two-thirds of those present voted to strike, the Union would accept the contract. (A. 7; B.A. 51-52, 57-59.)

After reviewing the contract, a majority of the employees voted to reject it. (A. 6-7; B.A. 52.) Chaszar repeated, for the second time, that in the strike vote, a two-thirds majority was required for a strike to be initiated or the Union would accept the contract. Fewer than two-thirds of the employees voted to strike. (A. 7; B.A. 31, 54.) Chaszar then announced that, because there was not enough support to go out on strike, “the contract was enacted.” None of the employees present at that meeting questioned the ratification procedure or the outcome. (A. 7; B.A. 54.)

Later that day, August 12, 2007, Chaszar notified the Company that “we have an agreement.” (A. 7; B.A. 55.) Plant Manager Hartz signed the agreement, which, by its terms, was effective for 1 year, from August 12, 2007 to August 11, 2008. The Company began implementing the agreement’s provisions. (A. 7, 16, 17; B.A. 19, 31, 55, 62.)

C. The Company Learns that a Majority of the Employees Did Not Vote for the Collective-Bargaining Agreement, and It Repudiates the Contract

On August 13, 2007, Plant Manager Hartz discussed the ratification election with some unit employees and learned that a majority of employees had voted to reject the contract. Hartz reported his discovery to the Company’s Chief Executive Officer Bob Proch, and asked Proch to look into the matter. (A. 7, 17; B.A. 27, 32-34.)

By letter dated September 11, 2007, the Company informed the Union that it had come to the Company's attention that a majority of the employees had voted against the contract. The letter continued: "Since ratification was an express precondition to agreement, it is clear that there is not, nor has there ever been, a contract between the [C]ompany and the [U]nion." The letter concluded by stating that, "[s]hould you wish to resume negotiations, please contact me." (A. 7, 17; B.A. 14.) Thereafter, the Company refused to recognize or honor the contract's provisions, and reverted to its pre-agreement terms and conditions of employment. (A. 6; B.A. 32.)

D. The Company Receives a Decertification Petition and Withdraws Recognition from the Union

By letter dated September 12, 2007, the Company informed the Union that it had received a petition signed by a majority of the employees disavowing their support for the Union. That very day, the Company withdrew recognition from the Union. (A. 6; 28-30.)

II. THE BOARD'S DECISIONS AND ORDERS

On the foregoing facts, the Board (Chairman Schaumber and Member Liebman) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to adhere to and repudiating its collective-bargaining agreement with the Union. (A. 5, 13.) In a separate order, the Board found that the Company violated

Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing and refusing to bargain in good faith with the Union and by withdrawing recognition from the Union as the exclusive collective-bargaining representative of its employees during the term of the parties' collective-bargaining agreement. (A. 17.)

The Board's first Order requires the Company to cease and desist from repudiating and refusing to adhere to the collective-bargaining agreement reached with the Union, and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). (A. 14.) Affirmatively, the Order directs the Company to, upon request, adhere to the collective-bargaining agreement reached with the Union; restore and give effect to its terms retroactive to August 12, 2007; continue those terms and conditions in effect unless and until changed through collective bargaining with the Union; and, if no such request is made by the Union for such adherence to and restoration of those contract terms, to bargain upon request with the Union for a new contract and embody any understanding reached in a signed agreement. The Board's Order also requires the Company to make the employees whole, and to post an appropriate remedial notice. (A. 14.)

The Board's second Order directs the Company to cease and desist from withdrawing recognition during the term of a collective-bargaining agreement with

the Union, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A. 17.) Affirmatively, the Order directs the Company to recognize and, on request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees, to post an appropriate remedial notice, and to provide the Regional Director sworn proof attesting to its compliance with the Order. (A. 17-18.)

SUMMARY OF ARGUMENT

The Company's contention that the Board's Order was not issued by a quorum of the Board must be rejected. Chairman Schaumber and Member Liebman, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Orders. Their authority to issue Board decisions and orders under such circumstances is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable situations under other federal administrative agency statutes, and general principles of common and administrative law. In contrast, the Company's argument is based on an incorrect reading of Section 3(b) and a misunderstanding of the statute governing federal appellate panels, which has no application to the NLRA.

The principal issue in this case is whether the Company and the Union explicitly agreed to the process to be followed in ratifying the contract. It is well settled that contract ratification is a matter solely within the province of a union and that an employer cannot lawfully question the ratification procedure as a means to avoid executing an agreed-upon contract, unless there was agreement on the procedure to be followed. Despite the lack of evidence that the parties ever discussed, much less agreed to, a specific form of contract ratification, the Company defends its repudiation of the agreement by relying on its flawed assumption that ratification in this case required a positive majority vote by the unit employees. The Board reasonably rejected this contention, finding no express or implied agreement, and further concluding that the Company's subjective understanding of what "ratification" should entail did not allow it to void the agreement.

Therefore, because the Board reasonably found no agreement on a specific ratification process, the Company has no standing to question the Union's ratification procedure to avoid executing the agreed-upon contract. Contrary to the Company's claim, the requirement of explicit and mutual agreement on ratification procedure is neither new, nor contrary to Board precedent. Moreover, because the Company may not raise questions concerning the Union's internal ratification procedures in the absence of an agreement, it is unnecessary and inappropriate for

the Court to consider whether, in fact, the procedure followed by the Union was inconsistent with the Union's standard ratification procedure, as the Company alleges.

Because the Company was not allowed to repudiate the contract, its challenge to the Board's finding that it unlawfully withdrew recognition from the Union during the term of a binding contract is easily dismissed. The Company admits that it withdrew recognition from the Union on September 12, 2007, 1 month into the term of the contract that it executed. Under well-established principles, the Union is entitled to a conclusive presumption of majority status during the term of any contract, up to 3 years; not even the Company's receipt of a valid employee petition disavowing support for the Union can overcome that presumption. Thus, given that the collective-bargaining agreement was in effect, the Board properly concluded that the conclusive presumption of majority support to which the Union is entitled during the 1-year life of that contract rendered the Company's September 12, 2007 withdrawal of recognition unlawful.

STANDARD OF REVIEW

As this Court has recognized, its review of the Board's order "is circumscribed." *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 987 (7th Cir. 2004). *Accord Livingston Pipe & Tube, Inc. v. NLRB*, 987 F.2d 422, 426 (7th Cir. 1993). Under Section 10(e) of the Act (29 U.S.C. § 160(e)), the applicable

standard of review is whether the Board's factual findings are supported by "substantial evidence on the record as a whole." *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 502 (7th Cir. 2003). *Accord NLRB v. Midwestern Personnel Services, Inc.*, 508 F.3d 418, 423 (7th Cir. 2007). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support the conclusion of the Board.'" *SCA Tissue North America*, 371 F.3d at 988 (quoting *Huck Store Fixture Co. v. NLRB*, 327 F.3d 528, 533 (7th Cir. 2003)).

Under the substantial evidence standard of review, the Court owes considerable deference to the Board's factual findings, inferences, and conclusions. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (the Board is "presumably equipped or informed by experience to deal with a specialized field of knowledge"). Thus, the Court will not dabble in fact-finding or displace the Board's selection between two fairly conflicting views of the evidence even if "the court would justifiably have made a different choice had the matter been before it *de novo*." *Id.* *See also SCA Tissue North America*, 371 F.3d at 987; *Central Transport, Inc. v. NLRB*, 997 F.2d 1180, 1190 (7th Cir. 1993). The Court has further emphasized that it "owe[s] particular deference to the Board's credibility determinations, which [it] will disturb only in extraordinary circumstances." *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1025 (7th Cir. 2005) (citations omitted). *Accord Sears, Roebuck & Co.*, 349 F.3d at 503.

The existence of a collective-bargaining agreement is essentially a factual question, and it is the Board's function to determine "whether negotiations have produced a bargain which the employer has refused to sign and honor" *NLRB v. Strong Roofing & Insulating Co.*, 393 U.S. 357, 361 (1969) (citing *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 428 (1967)). The Board's finding that an agreement was reached must be upheld if it is supported by substantial evidence. *Accord Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982). In addition, the Board has "substantial discretion in deciding whether to apply [its contract bar] rule in a particular case and in formulating the contours of that rule." *NLRB v. Dominick's Finer Foods, Inc.*, 28 F.3d 678, 683 (7th Cir. 1994).

To the extent that legal issues are involved, the Court applies a similarly deferential standard and will uphold the Board's determination if its legal conclusion has "a reasonable basis in law." *FedEx Freight East*, 431 F.3d at 1025 (and cases cited). If it has, "it should not be rejected merely because the courts might prefer another meaning of the statute." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). *Accord NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-03 (1983) (and cases cited therein). *See also NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984) ("On an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference."). Finally, "[w]here the Board adopts the [administrative law judge's]

findings of facts and conclusions of law, it is the [judge's] determinations" that the Court reviews. *SCA Tissue North America*, 371 F.3d at 988.

ARGUMENT

I. CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN ACTED WITH THE FULL POWERS OF THE BOARD IN ISSUING THE BOARD'S ORDERS IN THIS CASE

Chairman Schaumber⁴ and Member Liebman, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order in this case. As we now show, their authority to issue Board decisions and orders is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable circumstances under other federal statutes, and general principles of administrative law. In contrast, the Company's argument must be rejected because it is based on an incorrect reading of Section 3(b), and a misunderstanding of the statute governing federal appellate panels, which has no application to the NLRA.

⁴ On March 18, 2008, President Bush announced the designation of Member Schaumber as Chairman of the Board. *See* BNA, *Daily Labor Report*, No. 53, at p. A-11 (Mar. 19, 2008). On January 20, 2009, President Obama designated Wilma B. Liebman as Chairman of the National Labor Relations Board. *See* BNA, *Daily Labor Report*, No. 13, at p. A-8 (Jan. 23, 2009).

A. Background

The Act provides that the Board's five members will be appointed by the President with the advice and consent of the Senate, and will serve staggered terms of 5 years. *See* Section 3(a) of the Act, 29 U.S.C. § 153(a). The delegation, vacancy, and quorum provisions that govern the Board are contained in Section 3(b) of the Act, which provides in pertinent part as follows:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. . . . [29 U.S.C. § 153(b).]

Pursuant to this provision, the four members of the five-member Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board's powers to a group of three members, Members Liebman, Schaumber and Kirsanow.⁵ When, three days later, Member Kirsanow's recess appointment expired, the two remaining members, Members Liebman and Schaumber, continued to exercise the delegated powers they held jointly with Member Kirsanow, consistent with the express language of Section 3(b) that vacancy shall not impair the powers of the remaining members and that "two members shall constitute a quorum" of any group of three members delegated

⁵ Member Walsh's recess appointment expired on December 31, 2007.

the Board's powers. Since January 1, 2008, this two-member quorum has issued over 200 published decisions in unfair labor practice and representation cases (*see*, for example, 352 NLRB Nos. 1 through 126, and 353 NLRB No. 1, et seq.), as well as numerous unpublished orders.⁶

B. Section 3(b) of the Act, By Its Terms, Provides That a Two-Member Quorum May Exercise the Board's Powers

In determining whether Section 3(b) of the Act expresses Congress' clear intent to grant the Board the option of operating the agency through a two-member quorum of a properly-delegated, three-member group, the Court should apply "traditional principles of statutory construction," and this process begins with looking to the plain meaning of the statutory terms. *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1195 (5th Cir. 1997) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). The meaning of a term, however, "cannot be determined in isolation, but must be drawn from the context in which it is used." *Id.* (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)). Moreover, "a statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

⁶ As recently reported, the two-member Board quorum has issued a total of 312 decisions, published and unpublished. *See* BNA, *Daily Labor Report*, No. 15, at p. S-9 (Jan. 27, 2009).

Here, the plain meaning of the delegation, vacancy, and quorum provisions in Section 3(b) authorizes the Board's action. Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate "all of the powers which it may itself exercise" to a group of three or more members; (2) a statement that vacancies shall not impair the authority of the remaining members of the Board to operate; and (3) a quorum provision stating that three members shall constitute a quorum, with an express *exception* stating that two members shall constitute a quorum of any three-member group established pursuant to the Board's delegation authority.

In combination, these provisions authorized the Board's action here. The Board first delegated all of its powers to a group of three members, as authorized by the delegation provision. As provided by the vacancy provision, the departure of Member Kirsanow after his recess appointment expired on December 31 did not impair the right of the remaining Board members to continue to exercise the full powers of the Board which they held jointly with Member Kirsanow pursuant to the delegation. And because of the express exception to the three-member quorum requirement when the Board has delegated its powers to a group of three members, the two remaining members constituted a quorum—the minimum number legally necessary to exercise the Board's powers.

Although no court has addressed this exact issue,⁷ in a case where the Board had four members, the Ninth Circuit has held that Section 3(b)'s two-member quorum provision authorized a three-member panel to issue decisions even if the decision issued after the resignation of one of the three panel members. *See Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121, 122 (9th Cir. 1982).⁸ In addition, the United States Department of Justice's Office of Legal Counsel ("the OLC") has directly addressed the issue presented in a formal legal opinion. The OLC concluded that the Board possessed the authority to issue decisions when only two of its five seats were filled, where the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b). *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

The Company, refusing to give full effect to all of Section 3(b)'s express terms, asserts (Br. 25-26) that, because Section 3(b) only authorizes the Board to

⁷ This issue was argued before the D.C. Circuit on December 4, 2008, in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162 and 08-1214, and was argued on January 5, 2009, before the First Circuit in *Northeastern Land Services, Ltd. v. NLRB*, No. 08-1878. This issue has also been fully briefed in *Snell Island SNF v. NLRB*, Second Circuit Nos. 08-3822 and 08-4336, and in *NLRB v. Whitesell Corp.*, Eighth Circuit No. 08-3291.

⁸ In asserting that the court in *Photo-Sonics* "acknowledged the importance of the participation of 'all three panel members' in deciding the case," the Company (Br. 29) ignores the court's determination that even if the resigning Board member "did not participate in the Board's decision, the decision would nonetheless be valid because a 'quorum' of two panel members supported the decision." 678 F.2d at 123.

delegate its powers to “a group of three or more members,” that section precludes the remaining two members from issuing decisions if the third member leaves the Board. That argument, however, interprets the delegation provision in isolation, and gives no effect to Section 3(b)’s vacancy and two-member quorum provisions, which were drafted in tandem and appear in the same sentence. In contrast, the Board’s reading of Section 3(b) gives effect to *each* of those three provisions as they act in combination. In fact, the Board properly delegated “all of its powers” to a three-member group consisting of Members Liebman, Schaumber and Kirsanow, and the “vacancy” provision, which the Company fails to even mention, in combination with the two-member quorum provision for a three-member group, operate together to authorize Members Liebman and Schaumber to act for the Board and issue decisions. Accordingly, it is the Company that has failed to give meaning to all of the statute’s relevant provisions.

Essentially, the Company asks this Court to read into Section 3(b) an implicitly-required minimum number of three sitting members necessary for issuing decisions. As shown, the statutory language does not support the imposition of such a requirement. And, as we now show, the statute’s legislative history confirms that plain meaning, showing that Congress clearly intended that a two-member quorum of a properly-delegated, three-member group would be

authorized, upon the departure of the third member, to continue issuing decisions and exercise all of the other powers of the Board.

C. Section 3(b)'s History Also Supports the Authority of a Two-Member Quorum To Issue Board Decisions and Orders

As shown above, the meaning of statutory language cannot be determined by isolating particular terms, but must take into account the intent and design of the entire statute, as the Company concedes (Br. 25). *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574, 578 (1995). Thus, ascertaining that meaning often requires resort to historical materials, including the legislative history. *Id.* at 578.

A brief history of the Board's operations and of the legislation that ultimately became Section 3(b) of the Act confirms that Congress intended for the Board to have the option of adjudicating cases with a two-member quorum. As originally enacted in 1935, the NLRA created a three-member Board and provided in Section 3(b) that a vacancy would not impair the quorum of the two remaining members from exercising all powers.⁹ Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal labor policy, issued hundreds of decisions with only two of its three seats filled. *See,*

⁹ *See* Act of July 5, 1935, ch. 372, § 3(b), 49 Stat. 449, reprinted in 2 *NLRB, Legislative History of the National Labor Relations Act, 1935* (hereinafter "*Leg. Hist. 1935*"), at 3272 (1935).

e.g., *NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), *enforcing* 35 NLRB 621 (Sept. 23, 1941).¹⁰

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.¹¹ In 1947, however, when Congress was considering the Taft-Hartley amendments, the original two-member quorum provision was not a matter of concern. Indeed, the House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers.¹²

The Senate bill, while proposing to enlarge the Board and amend the quorum requirement, was careful to do so in a manner that explicitly preserved the Board's

¹⁰ From 1935 to 1947, the original Board issued 466 decisions during three discrete periods when it had only two seated members. First, from August 27 through October 11, 1941 (*see Seventh Annual Report of the NLRB* 8 n.1 (1942)), the two-member Board issued 224 decisions. *See* 35 NLRB Nos. 7-227; 36 NLRB Nos. 1-4. Second, from August 27 to November 26, 1940 (*see Sixth Annual Report of the NLRB* 7 n.1 (1941)), a two-member Board issued 239 decisions. *See* 27 NLRB Nos. 1-218; 28 NLRB Nos. 1-19. Third, from August 31 to September 23, 1936 (*see Second Annual Report of the NLRB* 7 (1937)), a two-member Board issued three decisions. *See* 2 NLRB 198; 2 NLRB 214; 2 NLRB 231.

¹¹ *See* James A. Gross, *The Reshaping of the NLRB: National Labor Policy in Transition, 1937-1947* (1981); Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (1950).

¹² *See* H.R. 3020, 80th Cong. § 3 (1947), reprinted in *1 NLRB, Legislative History of the Labor Management Relations Act, 1947* (hereinafter "*Leg. Hist. 1947*"), at 171-72 (1948); H.R. Rep. No. 80-3020, at 6, *1 Leg. Hist. 1947*, at 297.

authority to exercise its powers through a two-member quorum. Thus, the Senate bill would have expanded the Board to seven members, four of whom would be a quorum. However, that same bill authorized the larger Board to delegate its powers “to any group of three or more members,” two of whom would be a quorum.¹³ The Senate bill’s preservation of the two-member quorum option demonstrates that the proposed enlargement was not to ensure a greater diversity of viewpoint in deciding cases, contrary to the suggestion of one Senator.¹⁴ Rather, as the Senate Committee on Labor explained, the proposed expansion of the Board was designed to “permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage.”¹⁵ Senator Taft similarly stated that the Senate bill was designed to “increase[] the number of the members of the Board from 3 to 7, in order that they may sit in two panels, with 3 members on each panel, and accordingly may accomplish twice as much.”¹⁶ *See Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162

¹³ S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

¹⁴ Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

¹⁵ S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

¹⁶ Remarks of Sen. Taft, 93 Cong. Rec. 3837 (Apr. 23, 1947), *2 Leg. Hist. 1947*, at 1011. The three-member groups that the Senate proposed for the NLRB were similar to the three-member divisions that Congress had previously enacted for the Interstate Commerce Commission (“the ICC”) and the Federal Communications Commission (“the FCC”). Both the FCC and ICC statutes identically provided that

n.6 (2d Cir. 1981) (recognizing Congress’ purpose “to enable the Board to handle an increasing caseload more efficiently”). The Conference Committee accepted, without change, the Senate bill’s delegation and two-member quorum provisions, but, as a compromise with the House bill, agreed to a Board of five members.¹⁷

Despite having only two additional members, rather than four more as proposed by the Senate, the new five-member Board was able to leverage its two additional members by using them in three-member groups to issue decisions in a manner similar to the original three-member Board. As the Joint Committee created by Title IV of the Taft-Hartley Act to study labor relations issues¹⁸ reported to Congress the following year:

Section 3(a) of the [A]ct increased the membership of the Board from three to five members, and authorized it to delegate its powers to any three of such members. Acting under this authority, the Board in January 1948, established five panels for consideration of cases. Each of the Board members acts as chairman of one panel, and serves on two additional panels. Decisions in complaint cases arising under the Taft-Hartley law, and in representation matters involving novel or complicated issues, are still made by the full Board. A large majority of the cases, however, are being determined by the three-member panels.

“[t]he Commission is . . . authorized . . . to divide [its] members . . . into . . . divisions, each to consist of not less than three members. . . .” 48 Stat. 1068; Act To Provide for the Termination of Federal Control of Railroads, ch. 91, § 431, 41 Stat. 492. *See Eastland Co. v. FCC*, 92 F.2d 467, 469 (D.C. Cir. 1937).

¹⁷ 61 Stat. 136, 139 (1947), *1 Leg. Hist. 1947*, at 4-5; H.R. Conf. Rep. No. 80-510, at 36-37 (1947), *1 Leg. Hist. 1947*, at 540-41.

¹⁸ *See* 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

Staff of J. Comm. on Labor-Management Relations, 80th Cong., *Report on Labor-Management Relations*, Pt. 3, at 9 (J. Comm. Print. 1948).¹⁹ In this way, the Board was able to implement Congress' intent that the Board exercise its delegation authority for the purpose of increasing its casehandling efficiency.²⁰

In sum, by authorizing the Board to delegate its powers to a group of three members, two of whom constitute a quorum, Congress enabled the Board to increase its casehandling capacity by operating in groups identical to the original three-member Board. In practical terms, the Act's two-member quorum provision authorized the Board's new three-member groups to function as the original three-member Board had done, *i.e.*, to issue decisions and orders with only two of three seats filled.

¹⁹ See also *Labor-Management Relations: Hearings Before J. Comm. on Labor-Management Relations*, 80th Cong. Pt. 2 at 1123 (statement of Paul M. Herzog, Chairman, NLRB) (reporting that “[o]ver 85 percent of the cases decided by the Board in the past 3 months have been handled by rotating panels of 3 Board members” and that the panel system “has added greatly to the Board’s productivity”).

²⁰ The Board continues to decide the overwhelming majority of its cases by means of these three-member panels. See *Thirteenth Annual Report of the NLRB (1948)*, at 8-9; *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the H. Comm. on Gov’t Operations*, 100th Cong. 45-46 (1988) (*Deciding Cases at the NLRB*, report accompanying NLRB Chairman James M. Stephens’ statement) (“*1988 Oversight Hearings*”).

D. The Board Effectively Delegated Its Powers to a Group of Three Members

As shown, in anticipation of the expiration of the recess appointments of Members Kirsanow and Walsh, the Board delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers. The Company argues (Br. 25-26) that this delegation was somehow contrary to the plain language of Section 3(b) because, at the time of the delegation, the Board was aware that Member Kirsanow's departure was imminent and that, after his departure, the Board's powers would be exercised by the two-member quorum of Members Liebman and Schaumber.

The Company's argument implies that the Board's December 28, 2007 delegation of all its powers should be considered improper simply because the Board's purpose in making the delegation was to continue issuing decisions and fulfilling its agency mission through the use of the two-member quorum. In fact, however, similar eleventh-hour actions by a federal agency that were taken to permit the agency to continue to function despite vacancies have been upheld. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996), for example, after the five-member Securities and Exchange Commission ("the SEC") had suffered two vacancies, the remaining three sitting members promulgated a new quorum rule so the agency could continue to function if it had only two members. *Id.* at 582 & n.3. In upholding both the rule and a subsequent decision

issued by a two-member quorum of the SEC, the D.C. Circuit declared the rule “prudent,” because “at the time it was promulgated the [SEC] consisted of only three members and was contemplating the prospect it might be reduced to two.” *Id.* at 582 n.3. The statutory mechanism used by the Board is different but the result is the same.²¹

Likewise, in *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1335 (D.C. Cir. 1983), the D.C. Circuit upheld the delegation of powers by the two sitting members of the three-member National Mediation Board (“the NMB”) to one member, despite the fact that one of the two delegating members resigned “later that day,” leaving a single member to conduct agency business. The court reasoned that if the NMB “can use its authority to delegate in order to operate more efficiently, then *a fortiori* [it] can use [that] authority in order to continue to operate when it otherwise would be disabled.” *Id.* at 1340 n.26. Similarly, the NLRB properly relied on the combination of its delegation, vacancy, and quorum provisions to ensure that it would continue to operate despite upcoming vacancies.

²¹ The Company’s contention, moreover, fails to give effect to Section 3(b)’s vacancy provision. *Cf. Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (vacancy provision in Interstate Commerce Act vested the full power of the ICC in fewer than the full complement of commissioners). Indeed, the very effect that Congress intended to safeguard against—that a vacancy would impair the remaining members from exercising the Board’s powers—is exactly what would result if, as the Company argues, Member Kirsanow’s departure disabled the remaining two-member quorum from exercising the Board’s powers.

The NLRA, after all, was designed to avoid “industrial strife,” 29 U.S.C. § 151, and an interpretation of Section 3(b) that would allow the Board to continue functioning under the present circumstances would not only give effect to the plain language of the Act but would also further the Act’s purpose.

As this court has recognized, the presence of a quorum “is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.” *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (quoting Robert’s Rules of Order 3, p. 16 (1970)).

Section 3(b) of the Act expressly provides that two members of a properly-constituted, three-member group are a quorum. Thus, all the statutory requirements for “representative action” are satisfied here, because the minimum number of two Board members, which Section 3(b) prescribes for three-member groups, issued the decisions in this case.

E. Well-Established Administrative-Law and Common-Law Principles Support the Authority of the Two-Member Quorum To Exercise All the Powers Delegated to the Three-Member Group

The conclusion that the remaining two members of a three-member group can continue to exercise the powers of the Board that were properly delegated to that three-member group is consistent with established principles of both administrative law and the common law of public entities.

Under well-settled principles of administrative law, the delegation to the group of members Liebman, Schaumber and Kirsanow survived Member Kirsanow's departure. "Institutional delegations of power are not affected by changes in personnel, but rather continue in effect as long as the institution remains in existence and the delegation is not revoked or altered." *Railroad Yardmasters*, 721 F.2d at 1343. Indeed, as courts have agreed, "[a]ny other general rule would impose an undue burden on the administrative process." *Donovan v. National Bank of Alaska*, 696 F.2d 678, 682-83 (9th Cir. 1983) (quoting *United States v. Wyder*, 674 F.2d 224, 227 (4th Cir. 1982), and applying the rule that administrative acts continue in effect until revoked or altered). Thus, the Board's December 28, 2007 delegation of powers continued in full force.

Further, the conclusion that a vacancy in the three-member group does not disempower the remaining members from acting as the Board, as long as the statutory two-member quorum requirement is met, is congruent with common-law quorum rules applicable to public administrative entities. As a preliminary matter, there is no doubt that such common-law principles are relevant to construing the Board's quorum and vacancy provisions. Thus, in *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183-86 (1967), the Supreme Court recognized that Congress enacted statutes creating administrative agencies against the backdrop of common-law quorum rules applicable to public bodies, and indeed, wrote common-law rules

into the enabling statutes of several agencies, including the Board. *Id.* at 186 (also identifying the Interstate Commerce Commission).²²

At common law, the power held by a public board was held “not individually but collectively” (*Commonwealth ex rel. Hall v. Canal Comm’rs*, 9 Watts 466, 471, 1840 WL 3788, at *5 (Pa. 1840)), and “considered joint and several” among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at *16 (W.Va. 1875). Consistent with those principles, the majority view of common-law quorum rules was that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body, *see Ross v. Miller*, 178 A. 771, 772 (N.J. Sup. Ct. 1935) (collecting cases), even where that majority represented only a minority of the full board. *See, e.g., People v. Wright*, 30 Colo. 439, 442-43, 71 P. 365 (Colo. 1902) (where city council was composed of 8 aldermen and 1 mayor, and the terms of 4 aldermen expired, vote of two of the remaining aldermen and the mayor was valid because they constituted a quorum of the five remaining members).

²² In *Flotill*, the Supreme Court held that where only three commissioners of the five-member Federal Trade Commission participated in a decision, a 2-1 decision of those three commissioners was valid, recognizing the common-law rule that “in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” 389 U.S. at 183. The Court concluded that “[w]here the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.” *Id.* at 183-84.

That common-law principle is reflected in decisions involving federal agencies, which recognize, in a variety of statutory contexts, that decisionmaking by a minority of an agency's total membership is allowable under that agency's authorizing statute. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), the D.C. Circuit held that, in the absence of any countermanding provision in its authorizing statute, the SEC lawfully promulgated a two-member quorum rule that would enable the commission to issue decisions and orders when only two of its five authorized seats were filled. *Id.* at 582 & n. 2 (observing that the common-law rule likely permits “a quorum made up of a majority of those members of a body *in office* at the time”).

This Court's decision in *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 472-73 (7th Cir. 1980), similarly recognizes the principle of minority decisionmaking. There, this Court held that when only 6 of the 11 seats on the Interstate Commerce Commission were filled, five commissioners—a majority of the commissioners in office—constituted a quorum and could issue decisions. Similarly, in *Michigan Department of Transportation v. ICC*, 698 F.2d 277 (6th Cir. 1983), the Sixth Circuit held that, when 7 of the 11 seats on the ICC were vacant, a decision issued by the remaining 4 commissioners was valid. *Id.* at 279.

Finally, in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), the D.C. Circuit recognized that the enabling statute of the ICC not only permitted that agency to “carry out its duties in [d]ivisions consisting of three [c]ommissioners,” but also provided that “a majority of a [d]ivision is a quorum for the transaction of business.” *Id.* at 367 n.7. Based on that provision (which is analogous to the two-member quorum provision in the NLRA’s Section 3(b) (*see* p. 24 n.16)), the D.C. Circuit held that an ICC decision participated in and issued by only two of the three commissioners in a division was valid. *Id.*

Construing Section 3(b) of the NLRA to permit the two-member quorum to continue to exercise the Board’s powers that were properly delegated to the three-member group is consistent with the common law and court decisions reflecting that common law in the context of federal administrative agencies. The plain language of Section 3(b)—which provides for a two-member quorum as an exception to the three-member quorum provision where the Board’s powers have been delegated to a three member group—expresses the same common law principle reflected in the above SEC and ICC cases that, when faced with vacancies, public bodies can function through quorums that are less than a majority of the authorized membership of the public body. Accordingly, Section 3(b) should be read to justify the same result as in those cases.

F. Section 3(b) Grants the Board Authority that Congress Did Not Provide in Statutes Governing Appellate Judicial Panels

The Company contends (Br. 29-32) that the federal law governing the composition of three-judge appellate panels (28 U.S.C. § 46) should be imported to the NLRA to control how the Board exercises its authority to delegate powers to three-member groups, claiming that (Br. 29) “[t]here are no meaningful distinctions between the language” of 29 U.S.C. § 46(b) and Section 3(b) of the Act. To the contrary, the two statutes have sharp distinctions, and application of the federal judicial statute to the Board would improperly override express congressional intent and interfere with the option Congress provided for the Board to fulfill its agency mission through a properly-constituted two-member quorum.

The Company fails to grasp that Section 3(b) does not limit the Board’s delegation powers to case assignment. Under the express terms of Section 3(b), the Board may delegate “any or all of the powers which it may itself exercise” to a three-member group, which accordingly may act *as the Board itself*. Those powers are not simply adjudicative, but also administrative, and include such powers as the power to appoint regional directors and an executive secretary (*see* 29 U.S.C. § 154), and the power, in accordance with the Administrative Procedures Act, to promulgate the rules and regulations necessary to carry out the provisions of the NLRA (*see* 29 U.S.C. § 156).

By contrast, the judicial panel statute, in relevant part, is limited to adjudication of cases, providing that a federal appellate court must assign each case that comes before it to a three-judge panel. *See* 28 U.S.C. § 46(b) (requiring “the hearing and determination of cases and controversies by separate panels, each consisting of three judges”). *See also Murray v. Nat’l Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (recognizing that Congress expressly intended 28 U.S.C. § 46(b) to require that, “in the first instance, all cases would be assigned to [a] panel of at least three judges”) (quoting Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982)).

Moreover, Section 3(b), unlike 28 U.S.C. § 46(b), does not contain an express requirement that particular cases be assigned to particular groups or panels of Board members. Therefore, a delegation of “all the Board’s powers” to a three-member group means that all cases that are pending or may come before the Board are before the group. Thus, the two-member quorum retains the authority to consider and decide those cases, including the authority to issue the decision in this case.²³

²³ There is no indication in the legislative history of Section 3(b) that Congress wanted the Board to act more like the Circuit Court of Appeals with regard to case assignment. Rather, as noted at p. 24 n.16, the delegation provisions and case processing practices of the ICC and the FCC appear to be the model that Congress had in mind in crafting Section 3(b). Congress’ concern that the Board act more like a court was expressed in different provisions, such as Section 4 of the NLRA (29 U.S.C. § 154), which abolished the centralized “Review Section” that the

The Company's position is not furthered by its reliance (Br. 30-32) on *Nguyen v. United States*, 539 U.S. 69 (2003). Instead, that case calls attention to additional reasons why construing Section 3(b) of the NLRA to incorporate restrictions found in federal judicial statutes would constitute legal error. *Nguyen* illustrates that the judicial panel statute, 28 U.S.C. § 46, places limitations on the courts that Congress did not place on the Board in enacting Section 3(b) of the NLRA. In that case, the Court held that the judicial panel statute requires that a case must be assigned to three Article III judges, and that the presence of an Article IV judge on the panel meant that the panel was not properly constituted and could not issue a valid decision, even though Section 46(d) provides that two Article III judges constitute a quorum. *See* 539 U.S. at 82-83. In so holding, the Court took into consideration that Congress amended the judicial panel statute in 1982 "in part 'to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels.'" 539 U.S. at 83 (quoting *Murray*, 35 F.3d at 47, citing Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9). No such history underlies Section 3(b). *See* pp. 22-26. Moreover, the three-member group to whom the Board delegated all of its powers *was* properly constituted pursuant to

Board had relied upon to review transcripts and prepare drafts and limited the individual Board members to using legal assistants employed on their staffs to perform those functions. *See* S. Rep. No. 80-105, at 8-10, *1 Leg. Hist. 1947*, at 414-16.

Section 3(b), and thus nothing in the Court’s *Nguyen* opinion—even if it were applicable—would prevent the two-member quorum from continuing to exercise those powers. Also distinct is the *Nguyen* Court’s concern that the deliberations of the two-judge quorum were tainted by the participation of a judge not qualified to hear the case (*see* 539 U.S. at 82-83), a consideration wholly inapplicable here.

Ayrshire Collieries Corp. v. United States, 331 U.S. 132 (1947), also undermines the Company’s argument that the Board should be subject to federal law governing the composition of three-judge appellate panels. In *Ayrshire*, the Court held that a full complement of three judges was necessary to enjoin the enforcement of ICC orders because Congress, in the Urgent Deficiencies Act, had specifically directed that such cases “shall be heard and determined by three judges.” 331 U.S. at 137. The Court concluded that Congress “meant exactly what it said” (*id.*), finding it “significant that this Act makes no provision for a quorum of less than three judges.” *Id.* at 138. By contrast, in enacting Section 3(b) of the NLRA, Congress specifically provided for a quorum of less than three members, and did not provide that if the Board delegates all its powers to a three-member group, all three members must participate in decisionmaking.

G. The Board's Caution in Exercising Its Two-Member Quorum Authority Is No Reason To Question that Authority

The Company appears to claim (Br 32 n.13) that Chairman Schaumber and Member Liebman lacked the authority to issue the decision in this case because, historically, the Board had not previously delegated all of its powers to a three-member group so that a two-member quorum could continue the agency's mission when confronted with the possibility of multiple vacancies. Earlier Board inaction, however, is of no consequence because it is simply that—inaction—rather than a prior Board determination that the Board lacked the authority it exercised here. Moreover, in an analogous situation, where one Board member of a three-member group is recused from participating in a panel decision, the Board has frequently invoked its two-member quorum authority under Section 3(b). In those situations, the two remaining members issue the Board's decision as a quorum of the three-member group. *See, e.g., Pacific Bell Tel. Co.*, 344 NLRB 243, 243 & n.1 (2005); *Bricklayers & Allied Craftworkers, Local #5-New Jersey*, 337 NLRB 168, 168 & n.4 (2001); *G. Heileman Brewing Co.*, 290 NLRB 991, 991 & n.1 (1988), *enforced*, 879 F.2d 1526 (7th Cir. 1989).

Furthermore, even though the Board has been circumspect in exercising the authority argued for here, recent trends made it reasonable for the Board to expand the use of the two-member quorum option that Congress provided. In 2002, when it became clear that the slowing nomination and confirmation processes were likely

to result in an increase in the number and length of vacancies, the Board sought an opinion from the Justice Department’s Office of Legal Counsel, which in 2003 concluded that a properly-constituted, two-member quorum had the authority to issue decisions. *See Quorum Requirements*, 2003 WL 24166831, at *4 n.1. The Board first relied on that OLC opinion on August 26, 2005, when, at a time it consisted of three members, the Board delegated to itself as a three-member group all the Board’s powers in anticipation of the expiration of Member Schaumber’s term on August 27, 2005. *See BNA, Daily Labor Report*, No. 166, at p. A-1 (Aug. 29, 2005).²⁴ Subsequently, in late December 2007, when it appeared that the Board might be faced with an extended period—possibly stretching over an entire year—with only two members, the Board acted to continue to fulfill its statutorily-mandated mission and avoid the shutdown of day-to-day decisionmaking. The fact that the Board has acted cautiously in exercising its delegation authority only when necessary is no basis for questioning that the Board has that authority.

The Company also appears to claim (Br. 32 n.13) that Congress determined that three members were necessary on each decision in order to “ensure[] that the opportunity for different viewpoints and dissent is present in every case.” This is

²⁴ Four days later, Member Schaumber received a recess appointment. Accordingly, only one published ruling on a procedural motion (*Bon Harbor Nursing & Rehabilitation Center*, 345 NLRB 905 (2005)), and a few unpublished orders, issued during that period.

nothing more than an attack on the policy choice that the Taft-Hartley Congress made in 1947 when it authorized the Board to delegate its powers to a three-member group, two of whom shall be a quorum. Thus, in situations where the Board has properly delegated all of its powers to a three-member group, Congress has determined that two is the minimum number of members necessary to continue exercising those powers.

Moreover, the Company overlooks that for the first 12 years of its administration of the NLRA, the Board issued hundreds of decisions in cases decided by two-member quorums at times when only two of the Board's three seats were filled. *See* p. 23 n.10. If Congress were dissatisfied with the consequences of the two-member quorum provision in the original NLRA, it could have eliminated that quorum provision. Instead, in amending the Act after comprehensive review, the 1947 Congress preserved the Board's option to adjudicate labor disputes with a two-member quorum where it had purposefully exercised its delegation authority. That is the determinative policy consideration that controls this case.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REPUDIATING AND REFUSING TO ADHERE TO THE COLLECTIVE-BARGAINING AGREEMENT IT REACHED WITH THE UNION

A. Introduction

In this case, less than a month after it had executed and implemented a binding collective-bargaining agreement reached with the Union, the Company unlawfully repudiated that agreement because it questioned the Union's internal contract ratification procedure. The evidence amply demonstrates, however, that the parties never negotiated, much less agreed upon, a particular method of ratification. Rather, after the parties had reached complete agreement, the Union ratified the contract according to its established internal ratification procedure. The Company now claims that the ratification procedure applied by the Union was flawed, because a favorable ratification vote by a majority of unit employees was an agreed-to precondition to the contract, and the Union's failure to obtain such a vote meant that the contract never came into effect. As shown below, however, the Company's claim—in effect, that it can determine the method by which the Union ratifies the contract based on its subjective understanding of what constitutes ratification—is contrary to well-settled labor law and unsupported by the facts of this case.

B. General Principles

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the duly-chosen representative of its employees. This duty to bargain is defined by Section 8(d) of the Act (29 U.S.C. § 158(d)), which provides, in pertinent part, that “to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . and the execution of a written contract incorporating any agreement reached if requested by either party”

An employer’s refusal to sign and implement an agreement reached with its employees’ collective-bargaining representative thus violates the plain terms of Section 8(a)(5) and (1) of the Act.²⁵ *See NLRB v. Burkart Foam, Inc.*, 848 F.2d 825, 829 (7th Cir. 1988). As the Supreme Court has explained, an employer’s failure to bargain in good faith “discredits the [bargaining representative], impairs the bargaining process, and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining.” *H. J. Heinz Co. v. NLRB*, 311

²⁵ An employer that violates Section 8(a)(5) also commits a “derivative violation” of Section 8(a)(1), which makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise” of their rights under the Act. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). *See also Brewers and Maltsters, Local No. 6 v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005).

U.S. 514, 526 (1941). *Accord NLRB v. Strong Roofing & Insulating Co.*, 393 U.S. 357, 359-62 (1966).

Section 8(d) is silent about contract ratification, which is “an internal union matter,” and, as such, is not a subject of mandatory bargaining. *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979). *Cf. NLRB v. Roll & Hold Div. Area Transportation Co.*, 957 F.2d 328, 332-33 (7th Cir. 1992). Thus, ratification is not a valid precondition to a binding agreement unless the parties voluntarily make it so. *See Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967); *NLRB v. Darlington Veneer Co.*, 236 F.2d 85, 89-90 (4th Cir. 1956). Moreover, the relinquishment of a right conferred on a union by statute is not lightly inferred, but must be “clear and unmistakable.” *NLRB v. Roll & Hold Warehouse & Distribution Corp.*, 162 F.3d 513, 518 (7th Cir. 1998) (quoting *Metropolitan Edison Co. v. NLRB*, 460 U.S. 692, 708 (1983)). *Cf. NLRB v. General Teamsters Union Local 662*, 368 F.3d 741, 746 (7th Cir. 2004). Applying both of these principles, the Board requires specific proof that the parties expressly agreed to make ratification a precondition to a binding agreement. *See C&W Lektra Bat Co.*, 209 NLRB 1038, 1039 (1974), *enforced*, 513 F.2d 200 (6th Cir. 1975). Mere declaration of intent to ratify a contract, or “advice from the Union that the agreement would be ratified by the employees, does not establish a

condition precedent for the acceptance of the agreement.” *Southland Dodge, Inc.*, 205 NLRB 276, 278 (1973), *enforced*, 492 F.2d 1238 (3d Cir. 1974).

Since each party has a statutory right to limit the collective-bargaining agreement solely to mandatory bargaining subjects, internal union matters—which are not subject to mandatory negotiation—“cannot [affect] the validity of collective bargaining agreements.” *Newtown Corp.*, 280 NLRB 350, 351 (1986), *enforced*, 819 F.2d 677 (6th Cir. 1987). *Accord NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349-50 (1958). As the Sixth Circuit explained in *Houchens Market of Elizabethtown, Inc. v. NLRB*:

The Company, by insisting after all the other terms of the contract were agreed upon, that the contract be approved or ratified by a majority of employees, was attempting to bargain, not with respect to “wages, hours and other terms and conditions of employment,” but with respect to a matter which was exclusively within the internal domain of the Union It is not an issue which the Company can insist upon without mutual agreement with the Union, any more than the Union can insist that the contract be submitted to the Board of Directors or stockholders of the Company. The Union, by virtue of its certification as exclusive bargaining agent, was empowered by its members to make agreements on behalf of the employees it represented without securing the approval of those employees.

375 F.2d 208, 212 (1967). Because the Act places no obligation upon a bargaining representative to obtain ratification of an agreement it negotiates, any such requirement “could only [be] one which the Union itself assumed.” *North Country Motors, Inc.*, 146 NLRB 671, 674 (1964).

Moreover, even when there has been actual agreement to conduct a ratification election, the employer “may not raise questions concerning the Union’s internal [ratification] procedures in order to avoid its obligation to sign an agreed-upon contract.” *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979). *Cf. Hertz Corp.*, 304 NLRB 469, 471-72 (1991); *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224, 224 n.1, 234 n.3 (1991). Put more bluntly, unless there is an explicit agreement on the procedure to be followed in contract ratification, “it is none of [an employer’s] business how [or even whether] the [union] obtains the employees’ approval of the [e]mployer’s offer.” *Teamsters Local 251*, 299 NLRB 30, 32 (1990). As the Board noted here (A. 11), that conclusion is not the result of superficial analysis; rather, it is firmly rooted in the language of the Act and in the policies underlying its implementation. *See Roesch Transportation Co.*, 157 NLRB 441, 446 (1966) (“[A] contrary holding . . . would not only sanction employer interference with a union’s internal affairs but, indeed, would also place the employer in a position to sit in judgment over the union’s conduct of its business.”).

C. The Company Unlawfully Refused to Honor the Agreement It Reached, Signed, and Implemented

The Company concedes (Br. 15) that it repudiated the agreement it reached with the Union, despite the Union’s notice to it that the contract had been ratified. It defends its action by claiming (Br. 11, 18, 39-40, 48, 49, 52, 55) that its

repudiation was lawful because the process by which the Union obtained ratification contradicts not only the Company's "understanding," but also is opposite to the "commonsense understanding of ratification in the labor field." Therefore, argues the Company (Br. 7, 12, 40), the Union's "acceptance" of the contract after the employees voted against it cannot be considered ratification. However, unless the Company shows that there was an explicit agreement over the ratification procedure to be followed in this case, the Board's Order must be enforced.

The record is devoid of evidence that would allow the Company to make that showing. Although the Board assumed, without deciding, that the parties agreed to submit the contract for ratification on the day of the Union's acceptance, not a whit of testimony or documentation reveals any bargaining for, or agreement on, the methods and mechanics of the ratification process that the Union was required to utilize in ratifying the agreement. Indeed, although the Company and the Union met 25 times, over an 11-month period, they never discussed ratification method or procedure, not verbally, and not in the 46 written counterproposals that the Company submitted.

It is true that three of the Company's proposals contained references that the contract or the wage provision would not become effective until "ratified." However, none of those references referred to the type of procedure to be followed

for ratification. Moreover, when the parties verbally mentioned ratification for the first time on August 9, 2007, their cursory discussion only touched upon the Company's demand that it would not sign the agreement until it was ratified and the Union's acquiescence to schedule and conduct the ratification vote. Clearly then, the Company's claim that ratification by a majority vote was a condition precedent has no support in the record and is merely an attempt by the Company to belatedly insert itself into the Union's internal ratification process.

The Board also reasonably found (A. 13) that, in the absence of any negotiated agreement on how the Union would ratify the contract, the Union was left with the discretion to carry out the ratification as it saw fit,²⁶ and the Company has no standing to question the ratification procedure utilized by the Union as a means to avoid executing the agreed-upon contract. *See Childers Products Co.*, 276 NLRB 709, 711 (1985) (where employer had accepted the union's proposal "subject to ratification," but did not discuss the meaning of this phrase, "the method of ratification was within the [u]nion's exclusive domain and control," and the employer had no standing to question the union's internal procedure), *enforced*, 791 F.2d 915, 122 L.R.R.M. (BNA) 2576 (3d Cir. 1986) (table). *Accord Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1318 (5th Cir. 1988) (employer

²⁶ Indeed, as the Board demonstrated, ratification procedures like the Union's are ubiquitous. (A. 10 & n.13.)

impermissibly attempted to intrude into union's internal affairs by insisting that union change its constitutional ratification procedure to permit nonunion unit employees to vote on contract proposal); *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126, 1127 (2007) ("Board law is clear that [employer] has no standing to challenge [a union's] ratification process.").

Moreover, because the Company may not raise questions concerning the Union's internal ratification procedures in the absence of an agreement, it follows that the Company also has no standing to claim that those procedures were not followed. (Br. 14, 53-54.) Accordingly, "it is unnecessary and inappropriate [for the Court] to consider whether, in fact, the procedure followed by the Union was inconsistent with the Union's standard ratification procedure," as the Company contends. *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979). In any event, under Board law, recourse is available to those *with* standing—employees—who feel their rights have been violated by irregular or unlawful internal union policies. *See NLRB v. M&M Oldsmobile, Inc.*, 377 F.3d 712, 717 (2d Cir. 1967); *Martin J. Barry Co.*, 241 NLRB at 1013 n.5.

In this regard, the Supreme Court's decision in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), is instructive. In that case, the Supreme Court found that a contractual "ballot clause"—which required the union to poll union members before calling a strike or refusing the employer's last offer—dealt

only with internal relations between the employees and their union. *Id.* at 350. Since the ballot clause related solely to internal union affairs, it was not a mandatory subject of bargaining, and the employer's insistence on that clause as a condition precedent to the execution of a contract was unlawful. *Id.* The Supreme Court condemned the employer's insistence that the clause be included in the contract, noting that allowing an employer to insist to bargaining impasse on such a clause would substantially weaken the independence of the "representative" chosen by the employees by enabling the employer, in effect, to deal directly with its employees rather than with their statutory representative by forcing a vote. *Id.* Here, as in *Borg-Warner*, to permit the Company to challenge the Union's ratification on the ground that the Union failed to follow its ratification procedure would be tantamount to permitting the Company to interfere with the Union's autonomy over its internal affairs, giving rise to the same "weakening [of] the independence of the 'representative' chosen by the employees" that the Supreme Court condemned in *Borg-Warner*. *Id.* at 350.

Finally, the record amply supports the Board's sound rejection (A. 12-13) of the Company's corollary argument (Br. 19-20, 45-46) that, because it intended ratification to mean an up or down vote by the employees, and the Union did not, there was not a "meeting of the minds" between the parties and therefore no contract was formed. To begin, the Board specifically discredited (A. 12) Plant

Manager Hartz’s testimony that throughout negotiations, his “unexpressed understanding” of the Company’s intent was that it was proposing the particular form of ratification—an up or down vote—that the Company now relies upon to support its subjective intent (Br. 45-46). Moreover, even if the Board had credited Hartz, the Company’s subjective understanding (or misunderstanding) of the meaning of the ratification procedure that the Union followed here is irrelevant; under federal labor law, a “meeting of the minds” is determined “not by the parties’ subjective inclination, but by their intent as objectively manifested in what they said to each other.” *MK-Ferguson Co.*, 296 NLRB 776, 776 n.2 (1988). *Accord Windward Teachers Assn.*, 346 NLRB 1148, 1150 (2006); *Diplomat Envelope Corp.*, 263 NLRB 525, 536 (1983), *enforced*, 760 F.2d 253 (2d Cir. 1985); *Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979), *enforced*, 626 F.2d 119 (9th Cir. 1980). If the Company wanted an up or down ratification vote among bargaining unit employees, it should have opened its mouth and asked for one. As the Board stated:

[The Company] and the Union bargained for “ratification.” They got it. That it does not match what the [Company] wishes it had bargained [for], or hoped it would get, is of no consequence to its obligation to execute and adhere to the collective-bargaining agreement reached with the employees’ designated representative.

(A. 13.)²⁷

In short, as the Board reasonably found (A. 13), whether the Union and the Company understood ratification differently is irrelevant to the issue of whether they reached a binding collective-bargaining agreement. The Company demanded ratification at the end of the negotiations, and the Union met that obligation.

D. The Board's Order Is Fully Consistent with Board Precedent

The Company erroneously argues (Br. 19, 40, 33-43) that the Board failed to follow its precedent. Neither *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224 (1991), nor *Hertz Corp.*, 304 NLRB 469 (1991), the cases cited by the Company, stand for the proposition that a union's mere acquiescence to an employer's demand to take a tentative agreement to ratification, without more, establishes an agreement on the ratification *procedure* to be followed. To the contrary, in each case, there was evidence that the union failed to comply with the parties' agreement, whether for a specific ratification procedure (*Beatrice/Hunt*), or for a ratification meeting and vote itself (*Hertz Corp.*). As should be plain, this case is different because the Union complied with its sole obligation under the hastily-made agreement to submit the contract to ratification.

²⁷ Additionally, the Company acknowledges (Br. 51) that an employer may not insist on a ratification vote as a condition of reaching agreement. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *Hertz Corp.*, 304 NLRB 469, 469 (1991). Thus, if the Company is correct that the parties failed to reach agreement on ratification, then the Union never voluntarily agreed to submit the contract to ratification, and the Company has no defense for failing to sign the contract.

Thus, in *Beatrice/Hunt*, the parties signed a memorandum that not only made the contract contingent upon ratification in general, but also upon “the ratification process” that would be followed. 302 NLRB at 224 n.1. Specifically, there was express agreement for all unit employees, not just union members, to ratify the agreement. *Id.* at 228. After the union made three unsuccessful efforts to obtain unit employees’ approval of the agreement, it eventually resorted to limiting the ratification vote to the sole union member in a unit of approximately 100 employees. *Id.* at 227. In consequence, the Board held that the employer could insist that the agreed-to ratification process be followed and satisfied before a binding obligation arose to execute the collective-bargaining contract. *Id.* at 224 n.1. The union’s error in *Beatrice/Hunt* was not that it agreed to a ratification vote, but that—unlike the Union here—it specifically agreed to procedures for conducting the vote that it failed to follow.

Likewise, in *Hertz Corp.*, after bargaining concluded, the employer told the union that its “policy [was] not to execute an agreement until it had been ratified,” and the union explicitly agreed to submit the proposed contract for ratification. 304 NLRB at 469, 471. Nevertheless, the union never complied with the agreement; it neither held the ratification vote nor engaged in any ratification process at all. *Id.* at 469, 471, 472. Accordingly, the Board held that the union’s

breach of the agreement to submit the parties' negotiated contract to a ratification vote justified the employer's refusal to implement the contract's terms. *Id.* at 469.

Thus, although the Company specifically seeks (Br. 36-37, 41-42) to compare the actions in this case with the actions of the parties in *Hertz Corp.*, the Company ignores the fact that the decision in *Hertz Corp.* turned on one salient fact: The union there violated its obligation under the parties' agreement to meet with employees and conduct a ratification vote. 304 NLRB at 469.²⁸ Here, by contrast, the Union did not violate any aspect of its ratification agreement with the Company. Rather, as it had agreed to do, the Union convened unit employees at the exact date and time it had promised the Company it would do so, and it forthwith conducted the vote pursuant to its own procedures, thereby fulfilling its obligation under the ratification agreement.

The Company also defends its challenge to the Union's ratification process by contending (Br. 12, 38, 39, 40, 44) that the Union "misled" the employees and forced them to accept a contract that they had voted against. As shown above (pp. 7-9), during the ratification meeting, the Union fully explained, not once, but twice, its two-step process to the employees, and none of the employees questioned

²⁸ Contrary to the Company's claim (Br. 41 n.16), the fact that a ratification vote was held here and none was held in *Hertz Corp.* is not "a distinction without a difference." Indeed, as noted above, in *Hertz Corp.* the Board held that the employer's refusal to execute the agreement was not a violation of the Act because the union never complied with the parties' agreement to conduct a ratification vote. *Id.* at 469, 472.

the procedure or challenged the outcome. Thus, the Company's suggestion that it was acting as the champion of its employees' rights by repudiating the agreement is suspect. *See Southland Dodge, Inc.*, 205 NLRB 276, 279 (1973) ("Obviously [an employee ratification vote] became important to the [c]ompany only after it sought a means to escape the signing of the contract."), *enforced*, 492 F.2d 1238 (3d Cir. 1974). As the Supreme Court stated in *Brooks v. NLRB*, 348 U.S. 96, 103 (1954): "The underlying purpose of the [Act] is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." Moreover, as noted above, under the Board's rules, employees who feel that their rights have been violated by irregular or unlawful internal union policies have other means to protect themselves. *See NLRB v. M & M Oldsmobile, Inc.*, 377 F.2d 712, 717 (2d Cir. 1967); *Martin J. Barry Co.*, 241 NLRB 1011, 1013 n.5 (1979).

It follows, therefore, as the Board found (A. 13, 17), that the Company violated the Act by refusing to adhere to and repudiating the collective-bargaining agreement, based on its invalid objection to the Union's internal ratification process.

III. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM THE UNION

To ensure the stability of established bargaining relationships and to promote the Act's "overriding policy" of "industrial peace," the Board, with court approval, has strictly defined the circumstances in which an employer may lawfully withdraw recognition from an incumbent union. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37-39 (1987). *Accord NLRB v. Rock Bottom Stores, Inc.*, 51 F.3d 366, 370 (2d Cir. 1995). Generally, under the Board's so-called "contract bar rule," when the parties reach agreement on a collective-bargaining agreement that the employer has "accepted" and signed, the union is entitled to a conclusive presumption of majority support, and the union's actual majority status becomes irrelevant "during the term of that collective-bargaining agreement up to three years." *Auciello Iron Works v. NLRB*, 517 U.S. 781, 785, 791 (1996). *Accord Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 & n.17 (2001) (holding that "a union's majority status may not be questioned during the life of a collective-bargaining agreement up to 3 years"). *See also NLRB v. Dominick's Finer Foods, Inc.*, 28 F.3d 678, 683 (7th Cir. 1994) (citing *Bob's Big Boy Family Restaurants v. NLRB*, 625 F.2d 850, 851 (9th Cir. 1980)).

“The [contract bar] rule bars employers from repudiating the contract or withdrawing recognition of a union for the contract term.” *Dominick’s Finer Foods*, 28 F.3d at 683. *Accord NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 290 n.12 (1971) (“[D]uring [the contract bar] time, an employer cannot use doubt about a union’s majority as a defense to a refusal-to-bargain charge.”). As the First Circuit stated in *NLRB v. Marine Optical, Inc.*:

Since an employer may not petition for decertification during [the] contract bar period, it follows that he may not repudiate the contract or withdraw recognition from and refuse to bargain with the Union during the term of the collective-bargaining agreement A contrary rule would permit an employer to do on its own what would have been forbidden had it petitioned the Board, i.e., question the majority status of the Union Thus, during the period a valid collective-bargaining agreement is in effect, the Union, absent unusual circumstances . . . enjoys a conclusive presumption of majority support.

671 F.2d 11, 16 (1st Cir. 1982) (citations omitted). *Accord Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 838 (9th Cir. 1978); *YWCA of Western Massachusetts*, 349 NLRB 762, 763 (2007).

Here, the Company admits (Br. 15) that, on September 12, 2007, 1 month after it reached and executed a 1-year collective-bargaining agreement with the Union, it informed the Union that it was withdrawing recognition from the Union because it had received a petition signed by a majority of the employees disavowing their support for the Union. Under the authority cited above, however, the Union’s “conclusive presumption of majority support” arose at the moment the

Company “accepted” and signed the contract and, thereafter, for the life of that contract, the Company could not challenge Union’s majority status. *Auciello Iron Works*, 517 U.S. at 785. *Accord YWCA of Western Massachusetts*, 349 NLRB at 763; *Levitz Furniture Co.*, 333 NLRB at 97. Accordingly, given that the parties’ collective-bargaining agreement was in effect only since August 12, 2007, the conclusive presumption of majority support to which a union is entitled during the life of a contract renders the Company’s September 12, 2007 withdrawal of recognition unlawful. *See Utility Tree Service*, 215 NLRB 806, 807 (1974), *motion to reopen the record denied*, 218 NLRB 784 (1975), *enforced mem.*, 539 F.2d 718 (9th Cir.1976); *North Bros. Ford*, 220 NLRB 1021, 1022 (1975); *see also Valley Honda*, 347 NLRB 615, 615 n.6 (2006) (collecting cases).

Thus, if the Court agrees with the Board that the Company unlawfully repudiated the agreement, the Court should enforce the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition while the Union enjoyed a conclusive presumption of majority support. In sum, the Court should enforce the Board’s Order in full.

CONCLUSION

For the foregoing reasons, the Board respectfully asks that the Court deny the Company's petitions for review, and enforce the Board's Orders in full.

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February 2009

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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| NEW PROCESS STEEL, L.P. | * |
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| Petitioner/Cross-Respondent | * No. 08-3517, 08-3518, |
| | * 08-3709, 08-3859 |
| v. | * |
| | * Board Case No. |
| NATIONAL LABOR RELATIONS BOARD | * 25-CA-30632, |
| | * 25-CA-30470 |
| Respondent/Cross-Petitioner | * |

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,961 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003. The Board further certifies, pursuant to Circuit Rule 31(e), that the PDF copy of its brief submitted to the Court as an e-mail attachment to briefs@ca7.uscourts.gov was scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (2/5/2009 rev. 7), and found free of viruses.

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Dated at Washington, DC
this 9th day of February 2009

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's brief and supplemental appendix in the above-captioned case, and has served two copies of the brief and supplemental appendix by first-class mail upon the following counsel at the addresses listed below:

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